

No. 11268.

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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FRED STEIN and BERNARD STEIN,

*Appellants,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

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## APPELLANTS' CLOSING BRIEF.

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*To the Honorable Justices of the Circuit Court of Appeals  
for the Ninth Circuit:*

In the course of the oral argument, the question was asked whether counsel for Bernard Stein joined with Fred Stein in the objection to the yen shee.

On page 370 of the transcript of record, the following proceedings took place:

“Mr. Lavine: May it please the court, at this time we move to strike from the evidence the testimony which was offered yesterday regarding the yen shee, or particularly the exhibit, which I think was Government’s Exhibit 4, regarding the yen shee, as incompetent, irrelevant and immaterial under this indictment, as to any matters alleged in the indictment. And we move to strike it from the evidence.

The Court: The motion is denied and an exception noted.”

\* \* \* \* \*

“Mr. Lavine: I move, again, your Honor, on all of the grounds heretofore mentioned, first of all, for a directed verdict on the grounds of the insufficiency of the evidence; second, I move for a directed verdict on the grounds that the defendant Fred Stein was entrapped; and, third, I move for a directed verdict on the ground that as to some of the evidence in this case, relating particularly to Government’s Exhibit 4, I believe, the yen shee, the house was illegally searched and it was illegally seized.

\* \* \* \* \*

The Court: The motion is denied and an exception noted.

Mr. MacDonald: May it please the court, on behalf of the defendants John Fisher and Bernard Stein, and each of them, *I join in the same motions that were made by Mr. Lavine in reference to the defendant Fred Stein; \* \* \**”

It must be clearly borne in mind that the evidence regarding the yen shee first developed in the trial of the case, that the indictment did not charge anything about this yen shee, and the first knowledge of the facts about it came from the testimony at the time it was introduced. (See *McNabb v. U. S.*, 318 U. S. 322.) As a matter of fact, the prosecutor himself had not introduced it at first, and he later called back Marguerite Brander, with the consent of the Court, to ask further questions about it. [R. 193]. Upon its first introduction there was an objection to its introduction on the ground that it violated the defendant’s rights under the Fourth and Fifth Amendments to the Constitution of the United States and that the officers had at the time neither any search warrant or any process [R. 194].

The going into the house by the former sweetheart of Stein, who broke in with two bricks, and thereafter, on the day subsequent to the date of the finding of the cans of smoking opium in their house, with them and making a further search and seizure, was not lawful. Her nominal ownership of the premises as a joint tenant did not give the officers the consent of the defendant to search and seize the evidence.

*Amos v. U. S.*, 255 U. S. 313;

*Johnson v. U. S.* (decided Feb. 2, 1948), 16 L. W. 4133;

The mere fact that the deed to the property was placed in joint tenancy did not place the property in the ownership of Marguerite Brander. All of the money for its purchase was put up by the defendant Fred Stein. She was no more under the facts of this case than a trustee of his interest, with a possible right of survivorship in the event of his death. She was no more entitled to the property than other persons who receive property in their name, but are holding it for the benefit and trust of another. At no time did Marguerite Brander claim any right or title to the property itself, or right to possession or to remain there. She was not and could not be the lawful wife of the defendant, nor could she claim any rights thereunder if she had married the defendant. Many a person puts property in the name of another, but holds it for his benefit during the nominal title thus held. Marguerite Brander had no actual rights in the property and could not give consent to the officers to enter the

premises for the purpose of searching for and seizing evidence.

*Amos v. U. S.*, 255 U. S. 313;

*Johnson v. U. S.*, 16 L. W. 4133.

If a lawful wife cannot do so, certainly a woman in the position of Marguerite Brander could not do so. A joint tenancy, as a matter of law, even if its fullest effect were to be granted, would only give Marguerite Brander a separate and equal share in the property and such separate and equal share is divisible.

During the course of the oral argument there was also a question raised about whether the arrest itself was lawful, it being implicit in the argument that if the arrest was unlawful, any seizure that followed was necessarily unlawful.

*Johnson v. U. S.* (decided Feb. 2, 1948), 16 L. W. 4133.

Counsel for the Government stated that nothing had been brought up during the trial on this subject. On page 92 of the record the following occurs:

“Q. By Mr. Neukom: Did you get up close to the house? A. Yes. To get through the doorway from the side into the garage necessitates you getting fairly close to the house. That drawing is not very good. It isn’t in scale at all and that door is really closer to the house than would be indicated there, but that is as close as I did come to the house.

Q. Mr. Davis, in your experience as a narcotic officer have you ever had occasion to be near premises or rooms where opium has previously been smoked or cooked and detect or observe the odor of a place where opium has been so used? A. Yes, sir, I have.

Q. At the time in question on this evening did you observe any peculiar odor or any odors which in your opinion were those from a previous use of opium on the premises?

Mr. Lavine: Just a minute. I object to that as incompetent, irrelevant and immaterial and not proper redirect examination.

Mr. Neukom: There has been an effort made, your Honor, to point out this man had no probable cause for the arrest.

The Court: Let us not argue the question now. I can see the point. The objection is overruled.

Mr. Lavine: Exception.

The Court: Exception noted.

The Witness: I did not smell any smoking opium up there that night." [R. 92-93.]

It is apparent from the foregoing that counsel was well aware from the questions asked by counsel that "there has been an effort made to point out this man had no probable cause for the arrest," (referring to George R. Davis, a Government agent) and that Government counsel himself was so aware in the beginning of the case no effort was made to rebut or meet this testimony.

The procedure was challenged by motion in arrest of judgment, based upon objections that the defendant's constitutional rights under the Fourth and Fifth Amendments to the Constitution of the United States had been violated. While the motion was not specifically predicated on the unlawfulness of the arrest itself, the introduction of the evidence in the case could only be lawful if it was seized pursuant to a lawful arrest. Here there was not a lawful arrest. What the officers found later on could not be justified under the unlawfulness of the arrest itself and, therefore, both the search and seizure were unlawful.

At page 193 the following occurred:

“MRS. MARGUERITE BRANDER,  
a witness for the plaintiff, resumed the stand and testified further as follows:

Mr. Neukom: With the permission of the court and the consent of counsel, you will recall that there was quite a group of papers and packages up on the stand when I concluded the examination of the witness, and I neglected to make inquiry of this witness as to a little bottle, Government's Exhibit for identification No. 4. I would like permission of the court, believing it will save time, if I can ask a few questions about that and the cross-examination can continue.

The Court: Permission granted.

*Direct Examination.*

Q. By Mr. Neukom: I show you a little bottle, Government's Exhibit No. 4 for identification, and ask you if you have ever seen that before? A. Yes, sir.

Q. Will you look at it? At the time that you saw it did it contain approximately that much liquid? A. Yes, sir.

Q. And when did you first see this bottle containing the liquid? A. That was found in my cabinet where I keep my spices and flavorings.

Mr. Lavine: I move that the answer be stricken as a conclusion of the witness.

The Court: I didn't understand the answer.

(Answer read by reporter.)

Mr. Neukom: May I lay further foundation?

The Court: Did you find it? A. Yes, sir; I found it with two federal agents that were with me.

Q. By Mr. Neukom: When was that? A. That was the day after—that was the 15th.

Q. Of September, 1945? A. Yes, sir.

Q. Just tell us briefly what cabinet and where it was in the house.

Mr. Lavine: Just a minute, your Honor. We object to this as incompetent, irrelevant and immaterial. This is the first time this evidence has developed and we would like to make some inquiry on voir dire as to whether these federal agents had any search warrant at the time or any process.

The Court: Both of them had the same right of possession, isn't that true?

Mr. Lavine: Yes, both had the same right of possession, but as far as charging it to any other person than this person—I understood her testimony yesterday to be that she had left the place and that she broke in with a brick, threw a brick through a window and now we have Federal officers entering.

The Court: Objection is overruled.

Mr. Lavine: Exception.

The Court: Exception noted.

Mr. Lavine: So the record is clear, we object to this evidence on the ground it is violative of the Fourth and Fifth Amendments to the Constitution of the United States and on the further ground it was an illegal search and seizure with no process shown for the entry and search of this house.

The Court: Objection overruled.

Mr. Lavine: Exception.

The Court: Exception noted.

Mr. Neukom: May the record further show that there has been no motion made to suppress.

Mr. Lavine: May the record further show—

The Court: Just a moment, gentlemen, let us get on with the evidence. I do not want to hear too much

conversation from attorneys the same as you gentlemen do not want to hear too much from the court. After all, what the court says and what counsel say is not evidence in this case and the jury should not consider it.

Mr. Lavine: I appreciate that, your Honor.

The Court: And it is not an opportunity for arguing the case. Both of you will have plenty of opportunity to argue the case when the evidence is all in.

Mr. Lavine: He has made a legal objection and I want the record to show this is the first time this evidence has been unfolded and the first time the defendants have had any knowledge of it.

Q. By Mrs. Neukom: Mrs. Brander, did you take the Federal officer into the home with you? A. Yes, sir.

Q. And in doing so did you search about the kitchen and other places in the premises? A. Yes, sir.

Q. And in doing so where did you find this bottle? A. In the spices and flavoring cabinet just over the stove.

Q. And you turned it over to the Federal officers? A. Yes, sir.

Mr. Neukom: No further questions. I would like to offer the bottle in evidence.

Mr. Lavine: To which we object on the ground that it is incompetent, irrelevant and immaterial and in violation of the defendants' rights under the Fourth and Fifth Amendments of the Constitution.

The Court: Objection overruled and exception noted, and it is admitted in evidence.

(The bottle referred to, heretofore marked as Government's Exhibit No. 4, was received in evidence.)"  
[R. 193-196.]

The distinguishing incident of a joint tenancy is a right of survivorship.

*DeWitt v. San Francisco*, 2 Cal. 289;

*Greer v. Blancher*, 40 Cal. 194;

*Estate of Harris*, 169 Cal. 725;

*Hurlbert v. Title Ins. & Trust*, 181 Cal. 692;

*Green v. Skinner*, 185 Cal. 435;

*Hannon v. So. Pacific Ry.*, 12 Cal. App. 350.

Upon the death of a joint tenant who has paid for the property with his own money, the United States, for tax purposes, assesses the entire property as though belonging to him.

See:

*California State Bar Journal*, November-December, 1947, Vol. 22, "Joint Tenancy and the Estate Tax", p. 492.

It would seem only fair to argue that the right of a mistress—with several names and still married to someone else—who occupied a house [R. 219] and who had no interest in the property other than "it was put in her name" [R. 224-225], merely created a nominal title.

There is no evidence of any delivery of any deed to her, or of any intention on her part to receive the property as a joint-owner. To hold that after she left Stein, "she thereafter would have the power and authority to permit officers to enter and search the premises," is contrary to the decisions and purposes of the Fourth and Fifth Amendments to the Constitution of the United States.

Joint-tenants, in fact, may contract with each other concerning the use of such property—such as the exclusive use of the property by one of them, or the exclusive possession by one of them. (*Spahn v. Spahn*, 70 Cal. App. (2d) 791, 801.) Therefore, where the title is only nominal and the mistress vacates the same, certainly it would be wrong to hold that she has any rights to bring about a search *and seizure* by officers through her consent, since the joint-tenancy ownership is separate ownership and one joint-tenant may dispose of his interest in real property without the consent of the other.

*Wilke v. Vencill* (1947), 30 A. C. 99, 180 P. (2d) 351.

See also:

*Edmonds v. Commissioner of Internal Revenue*, 90 F. (2d) 14 (9th Ct.).

There is no intention of the parties in this case to make a gift of the property to Marguerite Brander, with whom Stein merely sought a place to live with her (according to Marguerite Brander's own testimony) and because none could be found, he bought a place with his own money [R. 224-225]. There is nothing to show that she received title to the property, or that she intended to hold title to it.

The Fourth Amendment to the Constitution forbids "search and seizure without a warrant or process", and Marguerite Brander had no more right to take these officers into the house by throwing two bricks through the

window, and gaining entry thereto, and admitting them, than did the officers, and thereafter to make a *seizure*.

She might have had authority to permit them to search for her property but not for his and in no event to seize his property.

*Amos v. U. S.*, 255 U. S. 313;

*Anne Johnson v. U. S.*, 16 L. W. 4133.

“Belief, however well founded, that an article sought is in a dwelling house furnishes no justification for a search of that place without a warrant, and such searches are held unlawful notwithstanding facts unquestionably showing probable cause. (*Ag-nello v. United States*, 269 U. S. 20, 33.)”

To permit searches as were conducted by the officers in this case is to transfer the Fourth Amendment to a nullity and leave the defendant's ‘home secure only in the discretion of police officers . . . The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government Agent.”

In *United States v. Di Re*, 16 L. W. 4071, 92 L. Ed. 218, the Supreme Court said: “The Government says it would not contend that armed with a search warrant for a resident only, it could not search all persons found in it.” The same reasoning would apply—only stronger—to the

contention that without a search warrant, the Government could now search a residence and seize articles therein, which were not the property of, and not contended to belong to, the person bringing them into the residence, to-wit, Marguerite Brander.

The things forbidden by the Fourth and Fifth Amendments are two: First, unlawful *search*, and, second, unlawful seizure.

*Boyd v. United States*, 116 U. S. 616, and  
*Takahashi v. U. S.*, 143 F. (2d) 118.

Even if he might say that the search was permitted by Marguerite Brander, the seizure thereof, without a warrant or other process, was in violation of the Fourth and Fifth Amendments to the Constitution of the United States:

“The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches *and seizures*, shall not be violated, and no warrants shall issue, but upon probable cause supported by oath or affirmation, and *particularly describing the place to be searched, and the persons or things to be seized.*” (4th Amendment, Italics are ours.)

In other words, there was no particular description, and no authority, for the seizure of the yen shee. Nor, for the seizure of the other packages from the premises, without a warrant.

### The Unlawfulness of the Arrest.

The court also discussed the question of the lawfulness of the original arrest. While counsel for the Government was well aware, as we have heretofore pointed out, that the lawfulness of the arrest was being questioned and challenged and so commented during the trial, he questioned our right to raise it in the Appellate Court. However, in *United States v. Di Re*, 92 L. Ed. 218, 223, the validity of the arrest was raised upon appeal and there considered. The court considered the arrest and its validity in connection with the unlawfulness of the search and seizure.

The Supreme Court of the United States considers the question of the lawfulness of the arrest in *U. S. v. Di Re*, *supra*, and the manner of arrest of the defendant Bernard Stein was clearly in violation of his constitutional rights.

As to the questions asked by Judge Bone, with reference to the odors of smoking opium, the Supreme Court held in *Anne Johnson v. United States*, 16 L. W. 4133, that "*odors are sufficient to constitute probable ground for a search.*" But, what the Supreme Court further hold is: "That odors alone do not authorize a search *without the warrant*," and that odors might be very persuasive on the basis to secure a search warrant. But, what the Court further holds is: "That a search without a warrant becomes unlawful when a warrant is obtainable." Hence this case is decisive that the only rights these officers had was to get a warrant.

In the present case, the undisputed evidence is that the Federal Officers were contacted at 5:59 p. m. on the night of September 14, 1945. The evidence further is that Marguerite Brander told the officers what she had found and wrapped up in three packages. There was no odor

to the packages and they were then wrapped up in wrapping paper, and later re-wrapped for the purposes of sending the packages to the court.

It was impossible to tell the contents of these packages without some examination; but such examination was possible and there was plenty of time to obtain a search warrant. The laziness of the officers in not getting the search warrant is no excuse for making the arrest and search permissible without a warrant. No probable cause existed from the mere statement of Marguerite Brander, who did not claim to be a user of the substance, and even if it did, it was something to be determined by a *judicial officer*, not the officers. (*Anne Johnson v. United States*, 16 L. W. 4133, decided February 2, 1948.)

As to the sufficiency of the evidence regarding Fred Stein, no one in this case testified that they ever saw Fred Stein with these cans or that he ever knew the contents of the cans. Marguerite Brander did not say that she discussed these particular cans with him, nor did she identify these cans as ever having been in his possession. The mere presence of the narcotics on the premises would not make them *his* any more than it would *hers*, and since it was never seen anywhere other than in the open garage—there is no proof sufficient to show that Fred Stein had these cans, or had had these cans at any time.

As to Bernard Stein, the evidence likewise is entirely insufficient, since the knowledge of the contents of the cans was not even actually known to the officers on that night. They arrested him merely on the word of Marguerite Brander.

### As to the Entrapment.

The evidence is, unmistakably, that up to the time that Marguerite Brander phoned Bernard Stein in the presence and hearing of Federal Officer Koehn, he had no possession of any narcotics and no intention of possession of the same.

The solicitation, inducement, and persuasion to come to the house at 3930 Dixie Canyon Avenue, came from Marguerite Brander, in cooperation with Federal Agent Koehn. It was she who telephoned to Bernard Stein, while Officer Koehn was listening. She had been living with an elderly, former federal officer named Mr. Keys [R. 197] and Mr. Keys had talked to Federal officers about Fred Stein prior to this night [R. 201]. It was Mr. Keys who gave Marguerite Brander the name of Mr. Koehn and she telephoned him and he came over and saw her at 7:00 o'clock that night [R. 202].

She thereafter called Johnny Fisher on the telephone, Mr. Koehn being present. He heard the conversation. She let him listen in on the conversation and she called in Mr. Koehn's presence and asked them to come over to the house [R. 205].

Furthermore the lure was conducted through the means of a telephone. The conversations were conducted by phone and the inducement was conducted by telephone by Miss Brander in cooperation with the Federal Officers. This certainly violated the Federal Communications Act, Title 47, Section 605, as follows:

“ . . . and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport effect, or meaning of such intercepted com-

munication to any person; and *no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit of another not entitled thereto*; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; . . .” (Emphasis added.)

Certainly the use of the telephonic instrument in the way testified to in the testimony of Miss Brander, herself, the Government’s own witness, shows that it was all conducted for the benefit of the Government’s agent seeking entrapment.

This violates both the Fourth Amendment to the Constitution and the statutory provision relating to Title 47, Section 605. See the following cases: *Nardone v. U. S.*, 302 U. S. 379 and 308 U. S. 338.

See, also, *Olmstead v. United States*, 277 U. S. 438, wherein Mr. Justice Brandeis, in a dissenting opinion, involving wire tapping before the Federal Communications Act of 1934 was passed, said:

“Experience should teach us to be most on our guard to protect liberty when the government’s purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest danger to liberty lurk in

insidious encroachment by men of zeal, well-meaning, but without understanding.

“Independently of the constitutional question, I am of opinion that the judgment should be reversed. By the laws of Washington, wire-tapping is a crime. Pierce’s Code, 1921, sec. 8976(18). To prove its case, the government was obliged to lay bare the crimes committed by its officers on its behalf. A federal court should not permit such a prosecution to continue. Compare *Harkin v. Brundage*, 276 U. S. 36, *ante*, 457, 48 Sup. Ct. Rep. 267 . . .

“Will this court, by sustaining the judgment below, sanction such conduct on the part of the Executive? The governing principle has long been settled. It is that a court will not redress a wrong when he who invokes its aid has unclean hands. . . .”

### **The Question of Entrapment Should Have Been Left to the Jury Under Proper Instructions.**

Mrs. Brander gave several versions of what she did and when she did it concerning the cans of “stuff.” When being cross-examined by Mr. McDonald, she said that on the day of her quarrel with appellant on which he left, she broke into the house by breaking a window with a brick.

She said, “after I got the rest of my belongings and little knick-knacks and things, I went back to 1629½ Pacific Avenue, the residence of Mr. Keys.” [R. 189.]

Mrs. Brander testified that on the 14th of September, 1945,

“I asked Mr. Keyes what the man’s name was that was out at the house to see him in regards to my going out with Fred Stein and he told me it was Mr. Koehn or Coen, he believed. He did not re-

member just how he pronounced his name but he knew how he spelled it. So we went to the directory and he found the name. He says, 'This is it,' so I was in need to call someone and wanted to get in touch with the authorities and I called Mr. Koehn, since he had already been out to the house and seemed to know something about the case.

I called him at his home. It was at night.

I asked him to come over, that I wanted to talk to him.

Yes, he eventually arrived there and it was after 7:00 o'clock. I know that.

After that time I called Johnnie Fisher on the telephone.

I don't remember whether the call was before or after that I had gone over this entire matter with Mr. Koehn. [Tr. 201-202.]

I told Mr. Koehn in that conversation that I had taken these cans of opium that I had found and planted them around back of the house. I told him I knew where it was; yes, sir."

Certainly it would hardly be reasonable not to infer that Mrs. Brander, who had in mind calling a narcotic officer that first night after Stein and she quarreled, and did so, would have proceeded to make her own plan as to how to proceed without discussing that most important detail with said officer.

Mrs. Brander admitted to the court that she knew that the officers would arrest the defendants as soon as they took possession of the packages. She undoubtedly knew, even when she called Koehn on the night of the quarrel, such an arrest would be made when, and if, the necessary evidence was secured. She knew at that time that she

did not then have the necessary evidence, aside from her own word.

Hence, from the fact that she called Koehn and conversed with him, and knew that without them she could not accomplish her purpose, it may be inferred that it was her purpose to have the officers tell her how to proceed, and what followed indicates that they did so, for the scheme of detection was carried out in a clever and professional plan.

Under cross-examination by Mr. Lavine, in one of her many speeches to the jury, Mrs. Brender first denied that in going to the police she expected to get cash out of Stein, and then continued as follows:

“I know the people I was dealing with better than that. Even if I had aimed or tried I knew just where I stood. I was going to turn it over to the Federal agents. I did not think it should go through any other hands. I don’t know. I have always tried to do things just right and the Federal agents were the one I thought it should be turned over to and I was holding it.” [R. Tr. 248.]

The conversation with the police, to which Mrs. Brander referred, she said occurred on the 12th or 13th of September. [R. Tr. 244, 245.]

Hence, according to her own volunteered testimony, she knew “just where she stood” with the Federal agents well before the trap was sprung, and since she had always tried to do things just right with them, she must have had experience in cooperating with them before and must have known that they would formulate the plan and procedure of securing evidence.

Mr. Keys, the mutual friend of Koehn and Mrs. Brander, was a party to the consummation of the plan. He

supplied Mrs. Brander transportation and supplied the flashlight for Koehn to inspect the packages of stuff which Mrs. Brander had secreted. This was on the 14th and before Fisher and Stein arrived [R. Tr. 248, 249].

Obviously, Koehn's only purpose in inspecting was to check Mrs. Brander's word. Mr. Keys' telephone was used by Mrs. Brander in calling Koehn and making other calls concerning the plot to entrap the defendants.

The direct examination of agent Koehn begins with September 14th, 1945, and adds little information concerning the parts which the Government agents and Mrs. Brander and Keys played and the relation of these persons to each other.

However, he admitted talking with Mrs. Brander at Keys' home and then listening to her telephone conversation with Fisher [R. Tr. 268]. After that he called Keys and asked him to meet Koehn at a certain point as soon as possible and then proceeded to that place with Koehn's wife and Mrs. Brander [R. Tr. 269].

On cross-examination, Koehn swore that he had never seen Mrs. Brander until September 14, 1945.

He said that when he arrived at home on that day his wife said "Uncle Jim" called; this was Mr. Keys, and he had made 100 calls to the houses in the last two years [R. Tr. 280].

Koehn denied that Mrs. Brander ever called Bernard Stein in his presence, but admitted that he had made notes of conversations of Mrs. Brander to which he listened in. She called Fisher in his presence, at about 7:30 and 8:00 o'clock [R. Tr. 281].

The entire picture presented by the testimony of Mrs. Brander and Koehn shows that Mrs. Brander, in a spirit of anger, tried to have Bernard Stein arrested on several charges among which some offense pertaining to narcotics; that through Keys, an old law enforcement officer, and close friend of Koehn, she contacted Koehn as early as the 11th of September and they had a conversation at Keys' home that day. The evidence warrants the inference that the plan and procedure which was followed through Mrs. Brander to entrap the defendants was Koehn's or was arranged by him together with Mrs. Brander, and that Keys took part, at least as a consenting participant.

Mrs. Brander's part was to secret cans of opium on the premises formerly occupied by her and Stein; to decoy Stein and Fisher to the place and make certain that they each took possession of some part of the opium, whereupon Koehn and his partner, Davis, were to arrest the defendants.

This conspiracy was carried out, although, as to Stein, it almost failed, because he at first refused to take possession of the package of cans which Fisher had not taken; however, Mrs. Brander taunted him into picking up the package, and he was then arrested.

Upon these facts appellant contends that an unlawful entrapment was perpetrated.

The testimony of Mrs. Brander about her conversation with Stein, in which she claimed that he had refused to return her clothes unless she gave him his "stuff," does not conclude the question.

The jury were not required to believe what she said and the evidence presented by the defense through the testimony of the defendants Fisher and Bernard Stein, if

believed by the jury, refutes Mrs. Brander's above mentioned claims.

According to their testimony, they did not know what was in the packages and were ensnared into picking each one up on Mrs. Brander's representation to them that it was an article of hers which she was taking from the premises. At her request they carried flower pots and other things besides the packages to the automobiles of Mr. Keys and "Mr. and Mrs. Patterson," as Koehn and his wife were called by Mrs. Brander when introducing them to the men.

In considering the law as applied to the facts herein, as shown by the testimony which has been reviewed, it is important to first note that this is not like one of the common cases of a dope peddler or druggist who habitually sells opium to anyone not suspected of being a federal narcotic agent.

If it originated in the mind of the law enforcement officers or their agents or of confederates whose inducements to the defendant were ratified or approved by such officers the defendants are not guilty, because citizens shall not be prevailed upon to commit a crime in order that the Government may punish them therefor.

Among the narcotic cases, it seldom occurs that a case of this type is presented, in which persons not employed by federal officers, but co-operating with them, have induced the crime. However, *Butts v. United States*, 273 Fed. 35, is one specimen of the class.

The opinion relates that one Rudolph, who had never obtained morphine from Butts while under arrest on a narcotic charge was told by Lake, a narcotic inspector for the Internal Revenue Service that if he, Rudolph, would help catch some law violators he would be let go.

Rudolph agreed and asked Butts for an ounce of morphine. Butts at first refused; Rudolph later made calls to Butts on the telephone importuning the latter to get him some morphine and finally Butts complied; Lake testified that he was present with Rudolph when the calls were made and furnished the \$190 for the morphine.

The court declared that the evidence conclusively showed:

“That the conception of and the intention to do the acts which the defendant did in this matter did not originate in his mind or with him, but were the products of the fertile brains of the officers of the government, which they instilled into the mind of the defendant, and by deceitful representations and importunities lured him to put into effect.”

The court states the following doctrine:

“The first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it. Here the evidence strongly tends to prove, if it does not conclusively do so, that their first and chief endeavor was to cause, to create, crime in order to punish it, and it is unconscionable, contrary to public policy, and to the established law of the land to punish a man for the commission of an offense of the like of which he had never been guilty, either in thought or in deed, and evidently never would have been guilty of if the officers of the law had not inspired, incited, persuaded, and lured him to attempt to commit it. It was fatal error to refuse to instruct the jury as requested, and it is unnecessary to discuss the other alleged errors at the trial, because, if they existed, they will probably not be committed again.”

*Peterson v. United States*, 255 Fed. 433, is similar to the instant case in that if the defendant's testimony were believed she was entrapped by soldiers in uniform who were sent out as investigators. However, she did not deny that she sold them liquor, and they testified that she had done so, but according to the defendant's testimony the men persisted in their importunities, assured her they were not cops and that she need not be afraid and worked upon her sympathies until she finally sold the beer.

The opinion concludes:

"It is obvious that the case did not present any question of law for the jury to determine, and only one controverted question of fact—that is to say, whether or not the defendant was instigated by the officers to sell the beer.

It results that the judgment must be and is reversed, and the case remanded for a new trial."

As to other points they are covered in the opening brief and not answered.

For which reasons we pray for reversal of the judgments.

Respectfully submitted,

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